

**Rose's Stores, Inc. and Marianne B. Green and Mary E. Jamison.** Cases 5-CA-11916 and 5-CA-12035

June 15, 1981

**DECISION AND ORDER**

On December 5, 1980, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.<sup>1</sup>

Respondent Rose's Stores, Inc., operates some 250 department stores throughout the South. The complaint alleges that Respondent, at its Hopewell, Virginia store, violated Section 8(a)(1) by terminating employees Marianne Green, Helga Ripani, Claudia Hoffman, Nancy Basham, and Mary Jamison because of their protected concerted activity of protesting Respondent's assignment of mandatory Sunday work.<sup>2</sup>

The Administrative Law Judge, relying on and crediting the General Counsel's witnesses, indicated that he did not believe the reasons given by Store Manager Merritt for the discharges and that he found the discharges to have been in retaliation for protected activities. Respondent excepts to the Administrative Law Judge's findings and the credibility resolutions on which he based his findings. Respondent contends the Administrative Law Judge failed to consider the testimony of a number of its witnesses which proves its defense.<sup>3</sup>

<sup>1</sup> Respondent has excepted to the Administrative Law Judge's recommended Order and notice to employees as being overly broad, in that he ordered Respondent to cease and desist from interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, and to bargain collectively. We agree and will modify the recommended Order and the notice accordingly. In addition, we note the Administrative Law Judge used the broad cease-and-desist language "in any other manner." In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Inasmuch as we do not find that the violations found herein meet this test, we find merit in Respondent's exceptions and will narrow the recommended Order and notice to require Respondent to cease and desist from violating the Act "in any like or related manner."

<sup>2</sup> The complaint also alleges that Jamison was discharged for protesting the layoff of another employee. Since the uncontradicted evidence clearly establishes that the decision to terminate Jamison had been made prior to the layoff of the other employee we shall dismiss this allegation.

<sup>3</sup> To the extent that the Administrative Law Judge's credibility resolutions are based on his evaluation of the demeanor of the witnesses, we

The Administrative Law Judge stated that Merritt was the only person testifying for Respondent as to the reasons for the discharges. Merritt testified he made the decision to terminate these employees and implemented it without consultation with or advice from anyone else in the Company. On December 29, 1979,<sup>4</sup> Merritt called in each of the dischargees individually and informed her that she had been terminated. He testified that he told each that 1979 had been a difficult year for him and he had contemplated transferring to a different store. However, he stated he had decided to stay and in 1980 he was going to run an operation that was "Rose's-oriented." He told each that the problem he had with her was her attitude and that was why she was being discharged.

Green, Ripani, and Basham testified that Merritt also talked to them about not wanting a bunch of women telling him how to run his store and that they were not going to drive him out. Green and Jamison testified that he accused them of "undermining his authority," and Hoffman testified that he told her she had a "bad choice of friends." Green also testified that he told her he was "tired of making excuses for Sundays—and tired of making excuses for certain people who didn't want to work on Sundays and he was tired of explaining to other people." Ripani stated Merritt said, "He could not continue to make schedules to satisfy a few of us and then have to explain to everybody," and Jamison stated that he told her that she only worked "what Sundays [you] want to." Merritt did not deny their testimony. Of even greater significance is the fact that Assistant Manager Tubbs was at the interviews but was not called to contradict the employees or testify as to what Merritt said.

In addition to the reasons he said he actually gave the employees for their discharges, Merritt also testified about a variety of incidents which he claimed formed the basis for his conclusion that these employees had a "bad attitude." Ten other witnesses presented by Respondent, including employees and supervisors, also testified as to these alleged derelictions of duty. The dischargees generally denied that these incidents occurred. Since these alleged derelictions of duty or incidents of misconduct were not given by Merritt when he discharged them, the Administrative Law Judge apparently found it unnecessary to discuss them.

note that our established policy is not to overrule an administrative law judge's resolutions unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>4</sup> All dates are in 1979 unless otherwise noted.

Although Respondent contends that the Administrative Law Judge failed to consider all the evidence, that evidence, which we will briefly summarize, does not suggest a different result in the context of this proceeding.

#### Marianne Green

Merritt and Tubbs testified to several instances where Green was allegedly rude to customers or refused them service.<sup>5</sup> These instances occurred throughout 1979, with a number occurring in the "fall." Since the summer of 1978, Tubbs and Division Manager Burton, Green's sister, had had difficulty with Green with respect to making the seasonal changes in her department. Green was also alleged to have upset her coworkers by her criticism of them.

Merritt testified he mentioned to or warned Green about most of these incidents when they occurred. Green generally denied having received any warnings although she admitted there might have been one incident.

#### Helga Ripani

Merritt testified that in 1978 and 1979 he had received a dozen employee complaints about Ripani's moodiness, grumbling, and sarcastic attitude. Assistant Manager Godfrey testified that in the late summer of 1978, Ripani, like Green, was reluctant to make the seasonal changes in her department. On two occasions, one in December 1978 and again in May 1979, she was alleged to have left the store without waiting to be released. Merritt, Tubbs, and Division Manager Brown claimed to have had customer complaints about Ripani not providing service throughout 1979, with "several" incidents allegedly occurring in the "fall," but these witnesses gave no details about the incidents which allegedly happened in the fall. There was little evidence that these complaints had been discussed with Ripani. Ripani admitted to having discussed only one of the customer complaints with management and otherwise denied having received any warnings.

#### Mary Jamison<sup>6</sup>

Throughout 1978 and 1979, Tubbs and Checkout Supervisor Emory contended that they had had

problems with Jamison being continually late to work, refusing to report to the checkout counter when called to assist there, and leaving the counter without permission. Her failure to assist at checkout also resulted in a dozen or more employee complaints to management. Two incidents of customer complaints were alleged in 1979, the last one in September. She admitted Tubbs questioned her about her continuing tardiness in October and promised to try to do better. Finally, she had received a written warning in January 1979 when she refused to move her car from the customer section of the parking lot.

#### Nancy Basham

Merritt and Tubbs testified that throughout 1978 and 1979 they had received employee complaints about Basham's moodiness. On a number of occasions in 1979 customers were alleged to have complained that she refused to help them set the time or change batteries of watches they purchased from her, but only one specific incident in June was testified to. Basham conceded she did not always change batteries but added that was because she did not have enough time and had been given conflicting instructions by Merritt and Godfrey as to whether she should perform such tasks.

#### Claudia Hoffman

Merritt's witnesses testified there was an "accumulation" of customer complaints in 1979 about Hoffman not being in her area with "several" occurring in the fall. Burton also testified that in late 1979 Hoffman had fallen behind in her paperwork and ordering responsibilities. Finally, on three occasions—once in early October, again around Thanksgiving, and again during the last 2 weeks of December, Merritt testified that Hoffman did not report to the checkout counter when paged. He said that he personally ordered her to the front on the first occasion but did not speak to her on the other two occasions.

That is the extent of the testimony showing the alleged actual reasons for the discharges. Merritt's justification for the fact that these employees were given no warnings was that when he came to the store in mid-1977 he thought it was very "uptight" and as part of his campaign to improve employee morale, he decided to cease issuing written warnings. Thus, he did not confront employees at every

<sup>5</sup> Contrary to the Administrative Law Judge, we find that even though this was a self-service store, the employees were still required to render service to customers, answer questions, or assist them with the merchandise.

<sup>6</sup> We reject Respondent's contention that Jamison's activities were not concerted and therefore her discharge could not be violative of the Act, regardless of its motivation. Jamison had discussed the issue of Sunday work with other employees who shared concerns. Her protest to her supervisor specifically stated it was not fair for them to make all the employees work on Sunday. Moreover, her protests concerned an issue

which had been the subject of a group protest only a month or two before. It is sufficient to make her activity concerted that other employees shared her concern and that she was acting on their behalf. *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215 (1977); *Air Surrey Corporation*, 229 NLRB 1064 (1977); *Carbet Corporation*, 191 NLRB 892 (1971); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

transgression, but tried to treat them as adults. However, when the situation became unbearable in 1979 he determined to discharge the offending employees after the Christmas rush. He testified that he had not originally intended to fire Hoffman but after her third offense in December he added her to his list. Respondent defended against the apparent arbitrariness of the terminations—the conceded failure to warn orally or otherwise any of these employees that they were courting termination—by indicating that it had no policy of issuing written warnings. The timing was further explained by a claim that there was substantial accumulation of incidents in the fall of 1979.

In our opinion Respondent's explanation for the discharges as set forth above, does not withstand close scrutiny. While Respondent established that it had no policy of issuing written warnings, it did not establish that it had a policy of firing long-term employees *en masse* for offenses it had tolerated for substantial periods of time. Even if one is to believe Respondent's testimony that of all its employees these were the only problem ones, it is clear that the problems were of longstanding duration and had been repeatedly condoned. There is no evidence that the incidents that allegedly occurred in the "fall" were of any greater magnitude than those occurring earlier—indeed, for Ripani and Basham, no specifics were given of any of the fall complaints. In addition, Respondent testified that it did not even raise many of the incidents with the employees. That those incidents were not raised with the employees appears inexplicable. If, for example, employees were urgently needed at the checkout counter and they refused to report, that Respondent would tolerate such conduct without even telling the employees appears highly unlikely.

On the other hand, Green testified that she had received numerous compliments on her work and Merritt conceded that he had told Green her paperwork was excellent when he discharged her. Basham also testified that Merritt had frequently thanked her for the service work she had done on customer's watches and had congratulated her for doing a good job when she received her 5-year pin in October.

Of other employees discharged in 1978 and 1979, none had more than 10 months of seniority. The discriminatees, to the contrary, ranged from 2-3/4 years for Hoffman to Ripani's 12 years of seniority—virtually the highest in the store. Merritt, himself, considered his actions unusual and specifically informed Marshburn, in advance, of the proposed discharges, which he did not normally do.

The General Counsel has established the concerted and protected nature of the activities en-

gaged in by the employees. That the protest of Sunday work was the real reason for the discharge is borne out by the striking identity between the protesters and the employees terminated (five of six). Merritt's own statements to these employees as they were discharged indicated that he resented being told what to do by "a bunch of women." Although he claimed the Sunday work protest was a "dead issue" in June, by raising it again himself in December, he indicated it was still very much alive. The special schedules enjoyed by Basham and Green and the resulting complaints by other employees served to keep the issue festering throughout the intervening months.

On the other hand, Respondent has not met its burden of showing the employees were discharged for cause. The mere presence of possible valid<sup>7</sup> reasons for discipline does not insulate a discharge if those reasons were not, in fact, the reasons for the discharge. Much of the behavior raised as a defense by Respondent had been tolerated for months and years without incident. Coupled with Respondent's conceded and unexplained failure to give any warning that these long-term employees were in serious danger of discharge, we are unable to find that this unprecedented mass discharge represented Respondent's normal pattern of operations, or that it, in fact, relied on the alleged misconduct in making its decision to discharge these employees. *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966). See also *American Manufacturing Associates, Inc.*, 234 NLRB 675 (1977).

Accordingly, we find that, by discharging Marianne Green, Helga Ripani, Claudia Hoffman, Nancy Basham, and Mary Jamison, Respondent violated Section 8(a)(1) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Rose's Stores, Inc., Hopewell, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as modified:

1. Substitute the following for paragraph 1(b):

<sup>7</sup> Respondent argues strenuously in its brief that the type of offenses charged to these employees—rudeness to customers, tardiness, leaving work without permission—can justify discharge. We, of course, do not disagree but as set forth, *infra*, must decide if those offenses were, in fact, the reason for the discharges.

"(b) In any like related manner interfere with, restrain, or coerce employees in the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge any of our employees for the purpose of discouraging their participation in concerted activities with respect to their conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL offer Marianne Green, Helga Ripani, Claudia Hoffman, Nancy Basham, and Mary Jamison immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole all five of the foregoing employees for any loss of pay they may have suffered as a result of the discrimination against them, with interest.

ROSE'S STORES, INC.

## DECISION

### STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on September 10 and 11, 1980, at Petersburg, Virginia, on complaint of the General Counsel against Rose's Stores, Inc., herein called the

Respondent or the Company. Two separate complaints were issued; the first (Case 5-CA-11916) issued on March 28, 1980, upon a charge filed on February 12, 1980, by Marianne B. Green, an individual. The second complaint (Case 5-CA-12035) issued on August 29, 1980, upon a charge filed on March 21, 1980, by Mary E. Jamison. The two complaints were consolidated for single hearing, and the essential question presented is whether five individual employees were discharged, in violation of Section 8(a)(1) of the Act, in retaliation for protected concerted activities. Briefs were filed by the General Counsel and the Respondent after the close of the hearing.

Upon the entire record and from my observation of the witnesses, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

The Respondent is a Delaware corporation engaged in the operation of a number of department stores at many locations; only its Hopewell, Virginia, location is involved in this proceeding. During the preceding 12 months, a representative period, the Respondent's gross revenues were in excess of \$500,000. During that same period it purchased and received materials in interstate commerce valued in excess of \$50,000 directly into the State of Virginia from out-of-state sources. I find that the Respondent is an employer engaged in commerce within the meaning of the Act.

### II. THE UNFAIR LABOR PRACTICES

#### A. *The Case in Brief*

This entire case presents no more than what is a pure question of fact: Why did the Respondent one day summarily discharge five long-standing employees without a moment's advance warning? More precisely put: Does the record as a whole prove the complaint allegation that in fact the five women involved were discharged because they joined, in concerted action, to protest management's imposition, not on a voluntary basis, of Sunday work assignments?

That what they joined in protesting directly involved conditions of employment, and that such common action on their part was statutorily protected against discriminatory retaliation by any employer, is the clearest established Board law. *Pabst Brewing Company*, 236 NLRB 1543 (1978).

The Respondent is a very large company, operating 250 retail stores with an overall complement of 13,000 rank-and-file employees. One man alone—Thomas Merritt—3-1/2 years manager of the one store where these five women always worked, and the top management representative in charge there, testified in defense as to the reason for the group discharges. He said he made the decision, and implemented it, without consultation with or advice by anyone else in the Company. He denied any illegal motive and, affirmatively, contended his sole reason for the discharges was the long-standing intolerable misbehavior of all five women. It is an inference

case. There is no direct evidence of improper purpose. None of the women was told, at the time of discharge, the reason was her concerted action.

#### B. *The Concerted Activity*

For some time Sunday work performed by regular store employees was voluntary, the necessary complement always filled by whoever offered to come. In April 1979, the Company announced that thereafter people would be scheduled, by management, to come on Sundays so many times a month, depending upon the needs of the season. The assignments were to be a compulsory chore upon whoever management chose. The new system was first announced at a meeting of store employees where about 35 were present. For the Company there was Store Manager Merritt, Operations Manager Reba Tubbs and Elliott Godfrey, the senior assistant to the manager.

There is conflict in the testimony with respect to only a small part of what was said during that meeting. All of the following is uncontradicted.

When the employees were told they would have no choice but to come in when told to, employee Marianne Green spoke up to ask "was it legal to order people to work on Sundays without first asking them?" Godfrey, who was then doing the talking, responded to Green by saying that if she had anything to say to come to the office to talk. Another employee, Helga Ripani, then said that if the employees were forced to work Sundays they should be paid double time. To this Tubbs replied that the Company did not even have to pay time and a half. Ripani also recalled that when Green raised the question of possible illegality in compulsory Sunday work assignments, Godfrey told her to see him individually. This testimony by Green and Ripani was corroborated by Claudia Hoffman, another employee. Employee Nancy Basham, also present, testified that when Green and Ripani spoke up, Godfrey told them there was nothing to discuss and to do it in private. Before the meeting ended, Merritt told Green and Ripani if they were in doubt as to the legality of all this they should inquire of the city attorney.

As stated, the foregoing is uncontradicted. Green also testified that when she and Ripani so objected to compulsory Sunday work, Merritt said it was "... here to stay and that we should cooperate," and that Godfrey said "If we knew what was good for us, we should cooperate or otherwise we knew where the clock was." Ripani quoted Merritt as saying at that point: "... whoever doesn't like it can go up and clock out." Hoffman's testimony is that Merritt said, "... either you work or ... ." And Basham quoted Merritt as saying "if we work for Rose's, we would do as Rose's said."

Both Merritt and Godfrey, testifying in defense, denied having voiced threats of any kind during that meeting to enforce the new rule. I leave this precise credibility question for resolution after consideration of the totality of Merritt's testimony on the record as a whole.

A week or so later, on May 8, all four of these women, and a fifth employee, Christine Pettyjohn, went to the city attorney's office in Hopewell. He gave them a printed leaflet explaining the so-called blue laws applica-

ble to this geographic area. On May 17, all five of these ladies were back in Merritt's office and showed him that paper. What happened at this meeting stands entirely uncontradicted on the record. According to the employee witnesses, Merritt said the legal statement about the law should be forwarded to the Respondent's central office in Henderson, and when the girls preferred keeping it, he made a copy for that purpose, and said he would later get back to the five with a response. As they talked, Ripani told Merritt that according to law all they had to do was give him that note. To this Merritt's response was it was not necessary, that he was "going to work out a compromise so that everybody will be satisfied."

Green also testified that during this meeting Merritt asked them if anyone else knew about this, and that when the women said no, he told them "Keep it among yourselves and do not spread it around." Ripani's version here is that when assured no one else knew about this activity by the five, Merritt said he would appreciate it if they told nobody. Basham corroborated Green and Ripani as to this.

With this, the Company went ahead with its unilateral scheduling of Sunday work to satisfy its requirements.

One day in June Horace Marshburn, personnel manager from the Respondent's main office, came to this store and separately called Green, Ripani, Basham, and Hoffman into the manager's office for a private talk. He said, at the hearing, his purpose was to check into this Sunday work problem Merritt had reported to him. Green's testimony is that, as they talked about the blue law, the two of them sparred back and forth, each asking the other what did he, or she, intend to do about it. She quoted Marshburn as saying, in the course of the rather extended interview, "Aren't you grateful that you have a job?" "You don't feel any loyalty towards the store?" "Aren't you afraid of losing your job?" "If my work depended on it would I work every Sunday?" Green came back with "the law clearly protects me," and then told Marshburn Sunday work interfered with her family and church life.

As to her interview, Ripani said Marshburn asked why did she not like Sunday work, commented that the law did not apply to this store, and added he would try to work something out to satisfy everybody. When Ripani asked "Do you mean to tell me if we don't want to work on Sunday, we don't work for Rose's at all?" Marshburn answered, still according to the employee: "That's the way it is."

In his talk with Hoffman, Marshburn also spoke of figuring out a Sunday schedule that would satisfy everybody. Basham's testimony about her interview parallels with that of Hoffman's. Marshburn said he wanted to discuss the "seasonal problem," asked how she felt about Sunday work, and did she like her job here. She told him she did not like working on Sundays, because of the "Bible" and her small child at home. Basham said she insisted to Marshburn that she would refuse to work more than one Sunday a month.

The personnel manager's story is that he did call these people to the office because he wanted to discuss with each the Sunday problem that had arisen and its legal as-

pects. Marshburn denied having voiced any threats to any of these employees, or having indicated even obliquely that their continued employment would be endangered if they persisted in protesting against compulsory work assignments. As in the case of the conflict in testimony on whether Merritt voiced threats of discharge in April, I will defer this credibility issue, too, until full consideration of the entire record. The witness stressed the assertion he had nothing to do with the discharge of these five employees, that it was all decided and implemented by the local, one store manager as though Merritt were an independent employer apart from the rest of the 250 of Rose's stores. The idea here is that even if Merritt lied at the hearing, and I suppose even if he did have a prohibited motive in what he did, his behavior or his personal credibility have nothing to do with Marshburn or with the Respondent. Without comment I will only say it is not a convincing proposition.

Ripani had worked in this store for 12 years, Green for 7, Basham for 5, and Hoffman for 2-3/4 years. Throughout their employment not one of them had ever before spoken with Marshburn.

Mary Jamison also worked on the floor as did the four outspoken opponents of forced Sunday work. She talked with other employees in opposition. She also told her supervisor, Joyce Morissette, that she was opposed to such compulsory assignments. She did this in the summer and again in October. What did she say to the supervisor? "That we shouldn't have to be made to work on Sundays, and that I didn't mind working one Sunday that was mandatory but I didn't want to work every other Sunday." This lady had worked for 7 consecutive years, and throughout that period no word of criticism was ever recorded against her. The listing of her alleged wrongdoings, spanning many years, as detailed by her supervisors, fully justifies the General Counsel's reference to *Hamlet* in his brief.

From June through the end of the year, the Company continued to schedule Sunday work to meet its needs. With Green and Basham insisting they would not come more often, they were asked to come only one Sunday each month. The other women were scheduled more often and worked.

### C. The Discharges

On December 29, after all the employees had punched in and were at work, Merritt called Green, Ripani, Hoffman, Basham, and Jamison separately into his office and fired each of them, then and there. Sitting in the office with him was his principal assistant, Tubbs. She uttered not one word during any of the interviews. While talking to Hoffman, Merritt told her Tubbs was sitting there so "no words would be twisted."

With a little variance only in the case of Jamison, all the manager's discharge talks followed a fixed, predetermined pattern. He told each of the women she was fired because of her "attitude." In diversified synonyms, this was the sole reason—if it can be called a reason—he gave them. From Green's testimony: "He didn't want a bunch of women telling him what to do, how to run the store," "corrupting my co-workers," "he was tired of making schedules for Sundays, and tired of making ex-

cuses for certain people who didn't want to work on Sundays." From Ripani's testimony: "He would not let a bunch of women drive him out of the store." From Hoffman's testimony: "I had a bad choice of friends . . . you were undermining me for a year and a half—your attitude was bad . . ." By Basham's testimony: "my attitude was lousy," "he was tired of my attitude." "He said he was tired of me telling him how to run the store . . ." "He could not continue to make a schedule to satisfy a few of us and then explain it to everybody else."

Understandably the women attempted to interrupt him by asking what was it they had done wrong to justify such criticism, what misconduct on their part was he holding against them. Repeatedly he told them to "shut up," and just listen. Time and again he refused to let them say a word. And through it all, as he himself admitted, he gave them no for instances, he referred to no special incident, or specification of any kind. He did no more than repeat the continuing generalization that their "attitude" had long been insufferable. As to each woman he had checks, previously prepared, for that day's work, for pay already earned, and for vacation and severance pay coming to them.

As will be explained below, a very revealing statement he made to them is also uncontradicted. He told Green, as he did all the other four, that they were to leave the premises immediately and not talk to anybody on the way out. By Green: "To leave the store immediately and not to talk to anybody." By Hoffman: "Do not say anything to anybody."

As stated above, at the hearing Merritt, the Respondent's top man in charge of this store, took sole responsibility for the discharge of these five women. He not only said no one above him in the managerial hierarchy had anything to do with the decision, but even added he never spoke of his decision with his subordinates until he informed them about it after having decided to take the action. He offered an explanation for the significant timing—immediately after the peak sales season of the year, the Christmas rush which he said extends from August to December 25. In colorful language he said he had decided, during the year 1979, to ask for transfer to another of the Company's stores in January because the place had become so terrible he hated to get up in the morning to come to work. In December he changed his mind and decided to stay, and in order to put an end to the "up tight organization" of the store, and make it a decent place to work in, he had to get rid of these particular five employees.

Merritt's testimony is an unending diatribe against each of the five, repetitively detailing their effrontery in flouting his personal authority and their continuing damage to the business by so disrespectful an attitude towards customers as to hurt the sales. The nature of his testimony—evasive, argumentative, conclusionary, almost entirely hearsay, and internally inconsistent in very revealing aspects—in my considered judgment deprives the witness of all credibility. I absolutely do not believe he—or the Respondent, for the store manager and the Respondent are one and the same under this statute—fired these five women for the reason Merritt gave at the hearing.

The discharges came as a complete surprise to every one of the five employees in question. Not one had ever been given the slightest hint of what was coming, not a word of warning or threat. The essential burden of Merritt's testimony is that keeping these people in the store was bad for the business; this has to be the basis of any manager's dismissal of so substantial a cadre of his older, more experienced personnel. But the truth—as to how the store was progressing—is exactly the opposite. Of all of the Respondent's 250 stores, this one was the 10th best, during the year 1979, in terms of "sales and profit." Merritt admitted his salary was—"very much so"—dependent upon the store profits, and that had he transferred to another store he would have earned less. If only for this one fact, his countless stories about customers coming to him—or to his assistants, as reported to him—complaining of this and that woman among the five, and then leaving the store in a huff with statements they would never return—fall flat. This store was doing extremely well, and companies enjoying such commercial success do not rationally decimate their working staffs.

It is because the objective facts—and there are others—make his story very, very unconvincing, that Merritt tried to separate the business success—and even the skill and competence of these five, which he also conceded—from his personal feelings, his sense of comfort, when he arrived at the store in the morning. From an employee of a company like the Respondent, such an idea, in the light of this total record, invites nothing but disbelief.

But whatever the problems created by the frailties and the faults of these women, the next question immediately becomes: Why did not Merritt do something about it sooner? A number of times he referred to certain specific complaints as having come to his attention in "the fall" of 1979. But again and again, either directly offered by him, or drawn from him on cross-examination, the dates went back to 1978, and even 1977. He had been manager here for 3-1/2 years. "When I first came to that store in 1977, it was very obvious that it was a very tight organization . . . it reflected in the people's work. It was an extremely uptight organization." From him, the history of rules, violations, discourtesies towards customers, and diversified incidents of misbehavior, was virtually all hearsay. Much of it, indeed, was double hearsay, for he kept talking of what lower supervisors had told him they had heard from customers. Asked had any records been made of these acts of misconduct, he said no, unequivocally. And, of course, it is not even claimed any of the five were ever punished, or disciplined, for anything they ever did. Moreover, as to most of the incidents he so obliquely talked about Merritt said he did not bring them to the attention of the employee assertedly involved. And when he did speak to this or that employee, he always accepted, on his own admission, their denials, or their different versions of what had happened, and left it at that.

In a case like this the absence of contemporaneous recordings of misbehavior later said to justify dismissal always casts a serious doubt upon the asserted defense. Merritt explained this away by saying that from the time

of his arrival his policy was not to issue any written warnings. ". . . we were not going to be a hell raiser, or a big stick carrier, or a threatening image to the employees . . . we were not going to wave papers in people's faces and threaten to write them up, threaten discharge." As the hearing progressed, facts developed which gave an absolute lie to this entire defense contention.

The General Counsel drew an admission from Merritt that there were such things as "corrective interviews." The witness' evasive tactics that followed are but one illustration of his very poor demeanor throughout his testimony. He tried desperately to avoid talking plainly, but finally admitted: "Yes, sir. They [records made of misbehavior, misconduct by these people] were written on corrective interviews." With the system of properly recording "corrective" talking of every kind in existence, the total absence of any such for any of the five discharged women proves conclusively there never was any criticism voiced by management to them before the sudden dismissal. And this is consistent with their own testimony that they were never reprimanded or warned about any wrongdoing. It follows, of course, that just about all the unending blackening of their service over the years is a trumped-up story.

That Merritt was not telling the truth about his largesse towards the employees as a total group is proved even more conclusively by the fact that he personally discharged no less than 13 employees of this store during 1978 and 1979, 9 of them during the 9 months before December 29, 1979. If in his opinion just a warning or a reprimand was a "big stick" "waved . . . in people's faces" that might unnecessarily disturb the peace and tranquility of the store, what did he think such outright discharges would do? The fact is he did reprimand people when he thought they deserved it, he did make records of misbehavior, and he did not hesitate to discharge employees when, for one reason or another, he thought fitting. The five ladies named in this complaint were completely acceptable to him as employees until something happened that made them no longer acceptable as employees. Whatever that "something" was, it was not the quality of their work performance, as Merritt now claims.

There are still more reasons why I do not credit the store manager. He gave too colorful and argumentative a recital of the ladies' asserted personal defects. An employer who fires an employee of many years, and is then accused of having had an improper motive, comes forth with very specific facts to justify his actions. Here, instead, are some of Merritt's stated reasons for discharging the women. *Basham*: She was ". . . gripey . . . hard she was to get along with . . . She came in one day she may be as happy as a lark, the next day she came in you had to have combat gear to get close to her." During the course of 2 years [1978 and 1979] ". . . she was very gripey, grumbly, and moody." *Rapani*: "I can't give you specific names on employees, I listened to so many. It's just an accumulation of hearing, hearing, hearing." "It was an accumulation of 1978 and 1979 . . . Very gripey, very grumbly to get along with, very sarcastic lady." Merritt added that when a customer told

him Ripani had been rude to her, he mentioned the fact to Ripani and when she told him it was the customer who had been rude, he said to the employee: "There is a fine line there. Just because he was rude, you know, you can't be rude." This was in the spring of 1979. *Hoffman*: "... her deteriorating interests in our operation . . . it was just a number of things. . . ."

Q. When did these occur?

A. I can't pinpoint the dates. They just accumulated during 1979.

Q. Can you recall the months?

A. No, I cannot recall the months.

Q. The seasons?

A. I cannot recall . . . I just felt like that her enthusiasm wasn't there, and I just felt that she wasn't oriented towards Roses. I just felt that she was negative about everything that I—that the Company wanted to induce . . .

Q. What policies was she negative about?

A. Mr. Levin, I cannot state to you every policy that somebody . . .

Q. Not everyone.

A. I cannot state you. It's just a general feeling. "We had problems with her in the latter part of 1979, as far as her interests in Roses concerning her book work, her enthusiasm, this type of thing.

*Green*: "I discharged that lady for her attitude. It was atrocious . . . Her attitude . . . her ability to work with management; all of those were zero." "The basic problems with Mrs. Green was her attitude . . . being obnoxious or being hard to get along with." *Jamison*: "She has an ornery streak . . . Is moody . . . Her nonchalant attitude about coming or not coming . . . we've had that problem continually, 1978 and 1979."

A store manager who is glad to retain employees for so many years, without a word of criticism, before suddenly dismissing them without warning, and then testifies in this manner, does himself no credit.

4. The Hopewell store is a self-service store; the customers pick their own purchases from the hangers, or from the shelves, try on the shoes they wish to buy—for size, etc., take their own purchases to the checkout counter where they pay. The store employees, like these five women, receive the stock, uncrate it, put in on shelves, display designated clothing on mannequins, price and reprice the goods, etc. They are not salespersons who service the customers as was true in retail establishments as of old. One of the complaints said to have reached management about some of these five is that they at times refused to service the customers—by adjusting watches, by putting batteries into digital time pieces, by helping people find the right size shoes or dresses, by refusing to permit customers access to dressing rooms in other departments, etc. Again, almost every separate incident of such misconduct charged to them ended either with their being told nothing by their supervisors or with an explanation which showed the customers were demanding more service than this Company chooses to provide under the established work rules. Entirely apart from the continuing hearsay aspect of the so-called customer complaints, all the record shows is that

the women chose to give first priority to the duties which were charged to them. And again, in a few instances, one or another did have the time to assist a customer, but did not care to do so. But it was not a matter, when it happened, that disturbed the supervisors at all, if only because they took no step to correct anyone.

5. Another story came to light, one that also points to how Merritt tried to twist reality into fancied fault finding. The store has a policy that customers may return any purchase they do not like. This is in keeping with a sign which announces that the Company guarantees "customer satisfaction." More than once Green, an old timer, voiced objections at the checkout counter, when a customer brought back a purchase which had been damaged after it had been taken home by the buyer. In various descriptive phrases, Merritt and his assistant Tubbs called this insubordination, flouting of the rule by the employee which damaged the Respondent's image.

At the hearing, Green admitted there were times she objected to accepting a return but only because she knew, from the records which she kept, that the item had not been purchased in this place. She also said she used to inspect the returned article to see whether it had been damaged after purchase, and in such cases did voice the opinion it was "wrong" to take it back. Testifying after her, Merritt started by saying the rule was to take anything back, damaged by the customer or not.<sup>1</sup> Then came Tubbs, Green's immediate supervisor: ". . . I would take something back, or Mr. Godfrey would, or whoever. Mrs. Green would jump all over the service desk person because she had taken it back." Tubbs' testimony then continued:

JUDGE RICCI: When some customer came back and didn't like something she had bought, it busted, maybe just damaged it the thing herself; whether or not and take it back and return her money, did you, on behalf of the company, exercise an element of discretion to decide whether you should give her the money back or not?

THE WITNESS: Yes.

Q. Along those lines, Mrs. Tubbs, have you ever refused to take an item back that a customer wished to return?

A. Yes, I have.

Q. How often has that occurred?

<sup>1</sup> From the transcript.

A. Mrs. Green was very vocal about taking back returns that she felt had been damaged or abused excessively.

. . . . .

Q. What is your policy with respect to customers returning items?

A. We take it back.

. . . . .

JUDGE RICCI: Are you saying that it was the company's policy if the customer bought something, the next day broke it, damaged it himself, without question the company would take it back and give him his money back?

THE WITNESS: Yes, sir. No question.

JUDGE RICCI: Even if he smashed it or broke it?

THE WITNESS: No question.



A. Not very often and it was, you know, when I thought something was being pulled over on us or something.

Comparison of the supervisor's testimony with that of the store manager's shows only one thing clearly: Merritt was deliberately creating a false impression to make Green look bad. He could not have said more explicitly that there was a rule that anything had to be taken back. No one could know better than he how false his statement was. All this shows, and Tubbs' testimony is all that is needed to prove Green right, is that the employee used her discretion, when objecting, in the Company's interest, just as did her supervisor. I can find no fault in her behavior.

No useful purpose would be served by continuing with every jot and tittle in the unduly extended testimony offered in defense. Just one or two more will suffice. Green was portrayed by Merritt as really the worst offender. During her last 5 years with the Company—uninterrupted employment—she was complimented a number of times. In November 1979—only a month before her discharge—she was used to organize a fashion show with some other organization off the premises. Some of the Respondent's stock, about \$2,000 worth, was taken there for display, and some sales were made. Both Merritt and Tubbs complimented her for her performance, saying it had been good advertising. The month before she had been given a 5-year pin. On that occasion Merritt told her: "I don't have to tell you what a good job you're doing. You know that already." All of this, utterly destructive of Merritt's testimony, stands uncontradicted.

In late December, after having made his final decision to fire these people on December 29, Merritt asked Green to take some extra time off in February, so the payroll could be kept down in the off season. When she agreed he thanked her for her courtesy. Merritt also asked Ripani—during the last week in December—to take 2 weeks off in January, with the same objective. I do not know just when the Respondent's decision to discharge these women was made; all I know for sure is that its principal witness lied when he talked at this hearing.

#### Analysis and Conclusion

I find, all things considered, that the Respondent discharged all five of these women because they chose to protest, in concerted action, the imposition of compulsory work assignments. They were selected by management for special treatment, i.e., treatment different from the way the Company handled problems of any kind when other employees were concerned. When Personnel Manager Marshburn came to Hopewell in response to the Sunday work issue these women had raised with the store manager, he spoke to four of the five; there is no indication he discussed that matter with any other of the 75 employee complement. When Merritt decided, as he said, to cure the store of a long-standing pervasive discord, he picked these five, and only these five, to discharge. And all five of the so selected discharges had been involved in the protest against forced Sunday work.

Except for just one other store employee,<sup>2</sup> no one else participated in the outspoken protest on that condition of employment.

That the protected, concerted activity was limited to these people—setting them in a class apart for that very reason—is proved even more significantly by the steps management took to assure that the expressed independent spirit of this group did not spread to others. It started with Supervisor Godfrey telling Green, at the first announcement of the new system in April, when she asked was it legal, that if she had anything to say to come to the office to do it. When, a month later, the women were in his office again to discuss applicable law, Merritt asked "if anybody else knew about this besides us;" when the girls said no, he told them to "Keep it among yourselves and do not spread it around." As Ripani recalled it, the manager said: ". . . he appreciated it that we came to him first and not telling anybody . . ." With the manager himself taking such precautions to limit the special activity to this group, his later special treatment accorded them, and only them, points to a very persuasive causal relationship between the two events.

Green also testified that at the initial announcement, when the women first voiced their objections, Supervisor Godfrey responded: "If we knew what was good for us, we should cooperate or otherwise we knew where the clock was." According to Ripani, at that point Merritt also said: ". . . whoever doesn't like it can go up and clock out." Although Godfrey and Merritt denied the threats, I credit the employee witnesses. Merritt stands discredited on this record. This means his subordinate, Godfrey, just parroted him. Basham recalled Merritt telling the group ". . . if we work for Roses, we would do as Roses said."

We come to Marshburn's interviews in June. As set out above, Green and Ripani testified that Marshburn gave them clearly to understand that if they persisted in disputing management's right unilaterally to assign Sunday work, it would be at the risk of their jobs. He denied having made threats. In the light of the now asserted affirmative defense as a whole—a clearly incredible story—I do not accept his denials. I credit the employee witnesses instead. Marshburn had never spoken to these women before. His separate interviews with them must, therefore, have been of considerable importance to him in the light of his position in the personnel department. When asked what Merritt had told him were the reasons for his decision to discharge these people out of a clear sky, Marshburn said he could not recall what the reasons were. This I can never believe. He was concealing something; what was he concealing?

I must believe, and I find, that Merritt had a reason for discharging these women. In the discharge interviews he did not tell them why; indeed in the face of their offended demands to be told why they were being dismissed, he refused to talk at all. No matter how often he returned to the refrain that it was their "attitude," he

<sup>2</sup> A fifth employee, Christine Pettyjohn, joined with the first four women in the visit to the city attorney and in the May meeting with Store Manager Merritt in his office. She was not discharged.

really was saying nothing. When to this is added the belated affirmative defense advanced 9 months later at the hearing—an utter falsehood—the inference of illegal motive is fully warranted. As stated in *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966):

If he [the Administrative Law Judge] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

In addition to the surrounding facts set out above, tending to reinforce the inference of illegality in this case, there are a number of phrases Merritt spoke to the employees on that last day. To Green: "He also said that he was tired of making schedules for Sundays, and tired of making excuses for certain people who didn't want to work on Sundays . . . ." To Basham: "He could not continue to make schedules to satisfy a few of us and then have to explain it to everybody else." "He just referred to making out a schedule to satisfy a bunch of us woman." To Jamison: "He was tired of people undermining his decisions . . . You have a bad attitude and you work what Sundays you want to." All this is supporting evidence that in his mind it was the employees' assertion of a right to dispute compulsory assignments that underlay his discharge decision.

And finally, he made it a point to tell every one of them to get off the premises quickly and not to talk to anybody. Why should he do that? Again, a reason he had to have. If he really was seeking to establish a more obedient attitude in the employee complement as a whole, what better way than to have the entire group learn what happens to disobedient dissidents? What he really feared—and tried to prevent—was a spreading throughout the store by the five activists of the statutorily protected activities which he resented and was determined to stop altogether.

In its brief the Respondent relies on the time gap between Marshburn's interviews with the women on the subject of Sunday work and the date of the discharges 6 months later. It contends that that fact alone serves to disassociate the two events completely. But Merritt also said the rush season starts in August and ends at Christmas. I think the delay is explained by the Company's need for the desirable services of these ladies, and that therefore the more logical explanation for the timing is that Merritt chose December 29 because there was no hurt to the Respondent then.

I find that by discharging Marianne Green, Helga Ripani, Claudia Hoffman, Nancy Basham, and Mary Jamison, the Respondent violated Section 8(a)(1) of the Act.

### III. THE REMEDY

The Respondent must be ordered to offer all five of these women reinstatement and to make them whole for loss of earnings. It must also be ordered to cease and

desist from committing the kind of unfair labor practices it has been carrying on and even stop violating the statute in any other manner.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### CONCLUSIONS OF LAW

1. By discharging Marianne Green, Helga Ripani, Claudia Hoffman, Nancy Basham, and Mary Jamison, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

### ORDER<sup>3</sup>

The Respondent, Rose's Stores, Inc., Hopewell, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or in any other manner discriminating against its employees because of their concerted activities.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Marianne Green, Helga Ripani, Claudia Hoffman, Nancy Basham, and Mary Jamison immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make all five of these employees whole for any loss of pay or any benefits they may have suffered by reason of the Respondent's discrimination against them, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289

<sup>3</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>4</sup>

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Hopewell, Virginia, copies of the attached notice marked "Appendix."<sup>5</sup>

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<sup>4</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>5</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursu-

Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by its representatives, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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ant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."